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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 431

J. R. KEATON,

Appellant,

vs.

CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION, AND DAVON OIL COMPANY, A CORPORATION, SUCCESSOR TO HARRELL-DAVIS COMPANY,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR APPELLANT OPPOSING MOTION TO DISMISS APPEAL.

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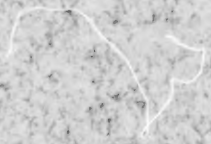

INDEX.

Subject Index.

	Page
History of Federal questions	2
Assignment of errors below	2
Summary of amended petition	3
Oklahoma zoning statute	4
Assignment of errors here	9
Lower court's opinion	12
What constitutes the raising of a Federal question	26
Actions which may be taken on pending motion	33

Table of Cases Cited.

Beveridge v. *Harper & Turner Oil Trust*, 168 Okla. 609	15
Blair v. *Chicago*, 201 U. S. 399, 471	19
Broadwell v. *Carter County*, 253 U. S. 25	29
Bumpus v. *Gas Co.*, 86 W. Va. 227	23
Carondelet, etc., Co. v. *Louisiana*, 233 U. S. 362	30
Chambers v. *B. & O. R. R. Co.*, 207 U. S. 142	30
Chicago, B. & Q. R. R. Co. v. *People*, 200 U. S. 561	31
City of Cincinnati v. *Lessee of White*, 6 Pet. 431	19
City of Leadville v. *Bohn Mining Co.*, 37 Colo. 248	22
Cleveland Electric R. Co. v. *Cleveland*, 204 U. S. 116, 129-30	19
Consolidated Coal Co. v. *Illinois*, 185 U. S. 203	30
Dewey v. *Des Moines*, 173 U. S. 193	32
East Chicago Co. v. *City of Chicago*, 171 Ind. 654	21, 23
Hiawassee, etc., Co. v. *Carolina, etc. Co.*, 252 U. S. 341	26, 27
Honeyman v. *Hanan*, 300 U. S. 14	27
Houston, etc., Co. v. *Texas*, 177 U. S. 66	32
Hubbard v. *Oklahoma City*, 177 Okla. 263	15
Keaton v. *Brown*, 171 Okla. 38	15
Klinger v. *Missouri*, 13 Wall. 257	29
Lawrence v. *State Tax Commission*, 286 U. S. 276	29

	Page
Lynch et al. v. *People*, 293 U. S. 52	27
Maguire v. *Tyler*, 8 Wall. 650	33
Mallinckrodt Chemical Works v. *Missouri*, 238 U. S. 41	30
Miedrich v. *Lauenstein*, 232 U. S. 236	30
Miller v. *New Orleans, etc., Co.*, 211 U. S. 496	30
Mobile & Ohio R. Co. v. *Tennessee*, 153 U. S. 486	32
Morgan v. *Chicago, etc., Co.*, 96 U. S. 716, 723	20
Murdock v. *Memphis*, 20 Wall. 590	33
Neil v. *Independent Realty Co.*, 317 Mo. 1235	23
Neilson v. *Lagow*, 12 How. 98	32
Noble v. *Oklahoma City*, 297 U. S. 481, 494	14, 34
North Carolina R. Co. v. *Zachary*, 232 U. S. 248	30
Oklahoma City v. *Keaton*, 178 Okla. 294	9, 16
Oregon, etc., Co. v. *U. S.*, 238 U. S. 393, 422, 427, 435	19
Otis Co. v. *Ludlow Mfg. Co.*, 201 U. S. 140	31
Phillips Gas & Oil Co. v. *Lingenfelter*, 262 Pa. 500	21
Priddy v. *School District*, 92 Okla. 254	21
Reichelderfer v. *Quinn*, 287 U. S. 315	21, 22
Rogers v. *County of Hennepin*, 240 U. S. 184	30
Russell v. *Sebastian*, 233 U. S. 195, 205	19
Schlemmer v. *Buffalo, etc., Co.*, 205 U. S. 1	33
School District v. *Barnes*, 110 Kans. 25	23
Sowadski v. *Salt Lake County*, 36 Utah 127	23
State of California v. *Deseret, etc., Co.*, 243 U. S. 415	30
Terra Haute, etc., Co. v. *Indiana*, 194 U. S. 579	29, 32
Tilt v. *Kelsey*, 207 U. S. 43	30
Toledo, etc., Co. v. *Slavin*, 236 U. S. 454	30
U. S. v. *Northern Pacific R. Co.*, 256 U. S. 51	26
Vincennes University v. *Indiana*, 14 How. 269, 276-7	21
Ward v. *Love County*, 253 U. S. 17	29
Washington ex rel. Oregon, etc., Co. v. *Fairchild*, 224 U. S. 510	26
Wayne v. *Miller*, 31 Mich. 447	23
West Chicago R. Co. v. *Illinois*, 201 U. S. 506	31

Statutes Cited.

	Page
Act of Congress of August 8, 1894 (28 Stats. L. 264)	3, 17
Constitution of the United States, 14th Amendment	27
Judicial Code, Section 237-c	34
Oklahoma Constitution:	
Article 2, Section 7	7
Article XI, Section 1	26
Oklahoma Statutes, 1931, Secs. 6170-6179	5
Oklahoma Statutes, 1931, Chapter 58	7
Ordinance No. 4475 of the City of Oklahoma City	4, 9
Session Laws of Oklahoma of 1923, Chapter 178	4
United States Code Annotated, Title 28, Sec. 344(a) (Judicial Code, Section 237, as amended)	1

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Appellees.

BRIEF FOR APPELLANT OPPOSING MOTION TO DISMISS APPEAL.

The motion quotes at length the opinion of the Supreme Court of Oklahoma and also quotes paragraph (a) of Section 344, of Title 28 of the United States Code (Sec. 237 Judicial Code, amended), and asserts that no Federal question was properly presented to or urged in the Supreme Court of the State of Oklahoma and that the Federal questions now raised were not determined by that court and were not necessary to the determination of the cause.

The history of the Federal questions presented by the appellant appears in our jurisdictional statement in paragraph 6 thereof, as follows:

> "6. The Federal questions were raised in the court of first instance by the entire subject-matter of the amended petition and specifically by paragraphs 11, 13 and 14 thereof. Demurrers were filed thereto on the (first) ground, among others, that the amended petition fails to state facts sufficient to constitute a cause of action, upon which ground the demurrers were sustained; petitioner stood upon his amended petition, judgment was entered against him, he appealed to the Supreme Court of Oklahoma, his assignment of errors in that court being:
>
> '1. That the trial court erred in sustaining the first ground of the general demurrer interposed by the defendants to plaintiff's amended petition, challenging the sufficiency of said amended petition to state a cause of action.
>
> '2. That the trial court erred in dismissing plaintiff's amended petition and rendering judgment for the defendants.
>
> '3. That the trial court erred in failing to find and hold that the facts stated in plaintiff's amended petition are sufficient to constitute a cause of action.'
>
> "The briefs on said appeal pointed out that the eleventh paragraph of the amended petition charged that the operations of the defendants 'constitute a taking of plaintiff's property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States' and the fourteenth paragraph thereof charges that 'the diversion of said tract to oil drilling and development not only caused plaintiff irreparable damage, but constituted a taking of his property without due process of law, in contravention of provisions of the State and Federal Constitutions.' The entire brief is devoted to the argu-

ment of these contentions in their various aspects as applied to the instant case. This is also true of the reply brief wherein appears the specific statement, 'It also deprives plaintiff of his property without due process of law.' The same arguments run throughout the petition for rehearing, which petition was denied on May 28, 1940, without opinion."

Summarized as briefly as possible, the amended petition sets out at length the Act of Congress approved August 8, 1894 (28 Stats. L. 264) (pp. 15-16, post) by which the abandoned Military Reservation of Oklahoma Territory, consisting of a quarter section of land, was granted to Oklahoma City in trust (paragraph 13-b of the amended petition); the proceedings by which the City undertook to plat the Reservation into lots, blocks, streets and alleys and included the same within the limits of the city as Military Addition thereto and dedicated four blocks as building sites and three to the use of the citizens of the city as a public park which park is known as Riverside Park (paragraph 13-c of the amended petition); that appellant is the owner of the south 130 feet of nine lots in said Military Addition, with the dates of acquisition of said lots by him, upon three of which he has erected valuable improvements costing $32,000 and upon two of the others of which he has also erected valuable improvements costing more than $38,000 (paragraph 1 of the amended petition); that appellant's said lots and the buildings thereon face Riverside Park on the north with only a sixty foot street between them and the north side of said park (paragraph 14 of the amended petition); that both of appellant's buildings are occupied by the Oklahoma Paper Company, as a tenant, and one of them was occupied originally by the Pioneer Paper Box Company as a tenant and partly because of the oil drilling encroachment complained of in the amended

petition this Company became insolvent and quit business in November, 1934 (paragraph 1 of the amended petition); that appellant's buildings are now, and at the times mentioned in the amended petition were, zoned in the "U-4" or "Industrial, Whole and Light Manufacturing" use zone, and the buildings in said zone or district are limited to those for industrial, wholesale and light manufacturing purposes and, under the zoning ordinances, the drilling of oil and gas wells is not permitted in said zone, and appellant erected his buildings in reliance upon said ordinances as they existed prior to June 9, 1933 (paragraph 3 of amended petition), on which day the City Council attempted to adopt ordinance No. 4475 whereby it attempted to extend the limits of the U-7 use zone to include Riverside Park; that the power and authorities of municipalities of Oklahoma to enact and amend zoning ordinances is conferred by Chapter 178 of the 1923 Session Laws, the applicable part of which is set out in paragraph 8 of the amended petition, as follows:

> "Section 1. For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.
>
> "Section 2. For any or all of said purposes, the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this Act; and within such districts it may regulate and restrict the erection, construction, re-construction, alteration, re-

pair or use of buildings, *structures or land.* • • • (Italics ours.)

"Section 3. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air, to prevent the over-crowding of land; to avoid undue concentration of population; to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, *as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.*" (Italics ours.)

(Said act was approved March 31, 1923, and is Secs. 6170-6179, O. S. 1931.)

The amended petition further recites that prior to the attempted enactment of the pretended ordinance No. 4475, all of the district included within the extension of the U-7 use zone made by said ordinance had been zoned as a commercial or business and light manufacturing district, and all of the substantial improvements erected on the various lots and parcels of land within said district are suitable only for such commercial and industrial purposes, and the owners of the respective improvements thereon, including the appellant, erected same in full reliance upon the zoning ordinance then in existence, particularly the one covering said area, and with the understanding that the entire district had been permanently zoned for such commercial and industrial purposes, and there was no justifiable reason growing out of the conditions relating to the "health, comfort or security" of the people living in or occupying said buildings, or of the general public, for the changing of the

zoning thereof from such commercial and industrial purposes, and the City Council had no legal power or authority so to change or expand the zoning restrictions on said district as to include that of mining for the production of oil and gas therein (paragraph 9 of the amended petition); that after advertising for bids for the drilling of two wells upon that portion of Military Addition dedicated to the public of Oklahoma City as Riverside Park, consisting of some eight acres, more or less, the City accepted the bid of Harrell-Davis Oil Company and on September 5, 1933 executed to it an oil and gas mining lease, in pursuance of the terms of which it has drilled and is now operating two producing oil wells on said park, one of which is located within about four hundred feet of appellant's improvements (paragraph 10 of the amended petition); that the drilling for oil from said Riverside Park has caused, and is still causing irreparable damage to appellant's properties by subjecting the buildings and their contents to much greater fire hazard, causing their occupants great inconvenience and discomfort from loud and raucous noises and offensive odors, the constant threat of destruction by fire, appellant's tenant being engaged in the wholesale jobbing of paper and other inflammable materials which are particularly subject to such destruction, constitutes a hazard which will virtually destroy the value of appellant's real estate and improvements, the district is devoted solely to wholesale and industrial purposes and is suitable for no other purpose, and the drilling for and production of oil and gas renders appellant's property undesirable, if not wholly unfit, for such purposes, by reason whereof appellant has been compelled to reduce the rentals derived from said buildings fifty per cent and his four vacant lots have become practically valueless, and the operations of Harrell-Davis Oil Company, and its successor in interest, the appellee Davon Oil Company, *constitute a taking of appellant's property without due process*

of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Section 7 of the Bill of Rights (Art. 2) of the Oklahoma Constitution (paragraph 11 of the amended petition); that said ordinance No. 4475, insofar as it authorizes the drilling and operation of oil and gas wells in Riverside Park, is void for the further reason that it violates the provisions of Chapter 58 O. S. 1931, defining nuisances, in that it specifically authorizes such operations as will necessarily obstruct the park and render same dangerous for use in carrying on amusements and other recreational activities, and by reason of the wrongful and unlawful acts of appellees, appellant has been damaged in the sum of Fifty thousand dollars or more, and said damage will increase so long as the operation of said wells or either of them continues (paragraph 12 of the amended petition); that the appellee City of Oklahoma City had no legal right or authority whatsoever to accept said bid or to execute said oil and gas mining lease, for the additional reasons that the City never acquired the fee simple or other merchantable title to the land included within the boundaries of Riverside Park, or any portion thereof, this statement being followed by a recital of the Act of Congress of August 8, 1894 (28 Stats. L. 264) (post, pp. 15-16), and the actions of the City Council in platting and dedicating Military Addition, following which is a further recital that after the dedication of Riverside Park the same was continually used for park purposes until the execution of said lease to the Harrell-Davis Oil Company (paragraph 13 of the amended petition); that appellant fully relied upon the fact that the dedication of said tract as a public park was irrevocable and exclusive at the times that he purchased his nine lots and erected lasting and valuable improvements on five of them, and the fact that said tract was so dedicated constituted a material inducement, both as to his purchasing said lots and the erecting of said improvements; that

he would not have purchased any of them or erected any of the improvements had he not firmly believed that the dedication of said tract as such park was irrevocable and could never be diverted to any other use or uses; that the diversion thereof by the appellee Oklahoma City by said pretended ordinance No. 4475 and the execution of the lease contract not only caused appellant irreparable damage but also *constituted a taking of his property without due process of law in contravention of certain provisions of both the State and Federal constitutions* (paragraph 14 of the amended petition); that Riverside Park, being a public utility thereof, appellee Oklahoma City cannot legally divert same, or any part thereof, to any other use than that specified in the Act of Congress and confirmed by resolution of the City Council, and appellant has a valuable vested property right in said park in the nature of an easement, of which right and interest he has been deprived by the wrongful and unlawful acts of the appellees as hereinbefore described and set forth, to his special damage in the additional sum of $10,000 (paragraph 15 of the amended petition); that the appellees had full knowledge of appellant's special interest in and objection to the drilling and operation of said lease at all times since August 21, 1933, by reason of the fact that on that day he filed in the District Court of Oklahoma County, Oklahoma, his petition alleging in substance the matters and things hereinbefore stated, and praying an injunction, a temporary injunction, a temporary restraining order and an injunction *pendente lite* against the execution of the proposed oil and gas mining lease or drilling contract, and against any and all operations looking to or in connection with the drilling for the production of oil and/or gas from Riverside Park or any portion thereof, and for general relief, which case was tried on January 23-25, 1934, and taken under advisement by the Court, findings of fact, conclusions of law and judg-

ment were made and rendered in favor of the defendants therein on April 23, 1934, motion for new trial was filed on April 26, 1934 and was sustained on September 21, 1934, the defendants therein served notice of intention to appeal on September 28, 1934, and did appeal on March 31, 1935, to the Supreme Court of Oklahoma from the order granting a new trial, and on September 8, 1936, the said Court, without passing on the merits of any controverted question involved in said cause, decided that all such questions were moot (*Oklahoma City* v. *Keaton*, 178 Okla. 294, 62 Pac. (2d) 981), and on October 7, 1936 petition for rehearing was filed, and it was denied on December 8, 1936 (paragraph 16 of the amended petition).

The prayers of the amended petition are that ordinance No. 4475 be held and declared invalid; that the lease contract between the appellees be declared invalid and be cancelled; that Davon Oil Company be enjoined from further operation of the two producing oil wells and each of them drilled on Riverside Park; that appellant recover from appellees, and each of them, the sum of Sixty thousand dollars, together with his costs herein laid out and expended, and for general relief.

The Federal questions now raised are set out in the assignment of errors in this Court as follows:

> "J. R. Keaton, plaintiff in the above entitled cause, and appellant for the allowance of an appeal to the Supreme Court of the United States, assigns the following errors in the record of proceedings and final judgment of the Supreme Court of the State of Oklahoma herein:
>
> "In holding that the provisions of Ordinance No. 4475 of the city of Oklahoma City are not repugnant to Section 1 of the 14th Amendment to the Constitution of the United States in that:
>
> "1. The Congress of the United States having granted to the city of Oklahoma City a quarter section

of land in trust, among other things, that no less than ten acres thereof should be set apart and used for the location of public buildings and for a public park, and the city of Oklahoma City having in accordance therewith set apart and used for public buildings four blocks, and for a public park three blocks of the said quarter section, and having laid out streets, alleys and avenues through the same, and having sold other parts thereof, including the lands now owned by the petitioner, and separated from said park by a street only sixty feet wide, the city of Oklahoma City never acquired the fee simple or other merchantable title to said park, known as Riverside Park, the three blocks constituting the same, or any part thereof, by virtue whereof purchasers of land fronting on the park, including the petitioner, have a vested property right in the nature of an easement or trust to require that it be maintained as a park, which dedication thereof by Congress and by the city of Oklahoma City is irrevocable and cannot be abridged or destroyed. The title to the park was and is held in the corporate name of the city in trust to and for the uses and purposes set forth and expressed or intended in the Act of Congress and in the dedicatory resolution or ordinance of the city of Oklahoma City, and there was and is no power or authority to change the trust or use declared in such dedications or in either of them.

"2. The city of Oklahoma City having promulgated zoning regulations placing the petitioner's property and the said park in the U-4 use zone limiting buildings therein to industrial, wholesale and light manufacturing purposes and not permitting the drilling of oil and gas wells therein, thereafter attempted by the said ordinance No. 4475, to include the same within the U-7 use zone permitting the drilling of oil and gas wells, but a zoning body cannot change zoning unless changes in the affected district demand or at least justify the same, that is, unless the public interest requires the change, and the public interest required that no change be made since the mere purpose of securing financial gain to the municipality or to other private parties or to both from

the oil operations is not a public interest sufficient to justify a change of zoning to the detriment of other property owners, especially as here such detriment far outweighs the financial gain; that said Ordinance #4475 so changing the classification of said district from the U-4 use zone to the U-7 use zone and authorizing the drilling and operation of oil wells therein, to the serious damage to petitioner's real estate situated therein, constitutes a taking of his property without due process of law, in violation of said Section 1 of the 14th Amendment to the Constitution of the United States.

"3. The City's action in promulgating said Ordinance No. 4475 was not governmental in nature but was in reality corporate or business and therefore was not a legitimate or lawful exercise of a zoning power in the public interest but action taken by it for its own financial benefit.

"4. The statement of the Supreme Court of the State of Oklahoma in its opinion that there may be a limited review by the courts, of the exercise of the police power in zoning matters, is incorrect, the true rule being that in the final result the determination of the questions involved in the attempted exercise of zoning power is a duty which the court must discharge as a judicial function.

"5. The said Ordinance No. 4475 insofar as it assumes to authorize the drilling and operation of an oil and gas well or wells, in Riverside Park, is void also for the reason that such drilling constitutes a nuisance in violation of the express statutory definition thereof contained in Chapter 58 Oklahoma Statutes, 1931, in that said Ordinance, by specifically authorizing such operations in Riverside Park, will necessarily obstruct the park and render the same dangerous for use in carrying on amusements and other recreational activities.

"6. Riverside Park is a public utility within the meaning of Section 27 of Article 10 of the Constitution of the State of Oklahoma and so long as it remains such,

> the City is without authority to lease any portion thereof for private gain and profit."

The motion to dismiss correctly stated (p. 5) that the Supreme Court of Oklahoma points out, in its opinion, that appellant's first three propositions in that court were presented and decided in three earlier opinions rendered by it. The motion to dismiss then quotes the three propositions referred to and dismisses the fourth and fifth as follows:

> "Appellant's fourth and fifth propositions are then discussed by the Supreme Court of Oklahoma and decided upon the general law of said State without any reference to or discussion of a federal question." (Pp. 5-6.)

Appellant's fourth and fifth propositions before the State Supreme Court, as set forth in his brief, are as follows:

> "The defendant Oklahoma City never acquired title in fee simple to any portion of the land included within the boundaries of said Riverside Park, hence had no legal authority to alienate same. But, even if it were conceded that the City acquired such title, still it had no legal authority to divert the use of any part thereof from park purposes to that of mining for the production of crude petroleum."
>
> "That plaintiff has a valuable vested property right in said Park in the nature of an easement, of which right and interest he has been deprived by the wrongful acts of the defendants."

That court did not dispose of propositions four and five "upon the general law of said state without any reference to or discussion of a federal question" but did so in the following language:

> "The plaintiff in his fourth proposition contends that the defendant, Oklahoma City, never acquired title in fee simple to any portion of the land included within the

boundaries of said Riverside Park, hence had no legal authority to alienate same. But, even if it were conceded that the city acquired such title, still it had no legal authority to divert the use of any part thereof from park purposes to that of mining for the production of crude petroleum.

"The reservation of title complained of is, 'that no less than ten acres of said reservation shall be set apart and used by said city for the location of public buildings, and for a public park.'

"We are of the opinion that although the conveyance contains the above use provision, it does not restrict the use of the land to that sole purpose, as is here contended. In Phillips Gas & Oil Co. v. Lingenfelter, 262 Pa. 500, 105 A. 888, 5 A. L. R. 1495, the court said: 'The insertion in a deed of a parcel of land to a school district upon which to erect a schoolhouse of the words 'for school purposes only' does not restrict the title of the district or prevent its leasing the property for the production of oil and gas.'

"In Priddy *v.* School District No. 78, 92 Okl. 254, 219 P. 141, 143, 39 A. L. R. 1334, we had under consideration a deed made to the school district, which deed contained the following provision: 'As long as used for a schoolhouse site.' In after years the school site was leased for oil and gas purposes by the school board and after oil was discovered the owner of the reversionary interest brought suit to recover damages by reason of the production of oil upon said property. We held that the deed conveyed fee-simple title subject only to abandonment as a school site.

"The plaintiff contends in his fifth proposition that he has a valuable vested property right in said park in the nature of an easement, of which right and interest he has been deprived by the alleged wrongful acts of the defendants. This contention may be answered by referring to Reichelderfer *v.* Quinn, 287 U. S. 315, 53 S. Ct. 177, 77 L. Ed. 331, 83 A. L. R. 1429, which held that: 'Landowners derived no rights against government merely from dedication of nearby land as park;

such dedication being declaration of public policy, which same or succeeding Congress might change by devoting land to other uses.'

"In the case of East Chicago Co. *v.* City of East Chicago, 171 Ind. 654, 87 N. E. 17, 18, the court said: 'Owners of private property in the vicinity of a public square, whose means of ingress and egress would not be destroyed or affected by a discontinuance of its use for public purposes, have no vested rights in its continued use as a public square, their losses being merely consequential and not direct, and its discontinuance would not be a taking of private property without compensation.' "

It thus appears that the entire subject-matter of appellant's amended petition and specifically paragraphs 11, 13 and 14 thereof raise the Federal questions of a taking of appellant's property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States; that the defendants filed general and special demurrers, the first ground of the demurrer being that the amended petition failed to state facts sufficient to constitute a cause of action, upon which ground the demurrers were sustained, and appellant stood upon his amended petition, judgment was entered against him and he appealed to the Supreme Court of Oklahoma.

The Federal questions having been specifically raised in the amended petition, and demurrer having been filed thereto and sustained on the ground that it failed to state facts sufficient to constitute a cause of action, surely the assignment of errors (*supra,* pp. 1, 2) was sufficient to raise the Federal questions in the Supreme Court of the State. While that court dismissed appellant's first three propositions with the statement that they had already been decided by it in previous cases, this is no bar to a review here. *Noble* v. *Oklahoma City,* 297 U. S. 481, 494.

Appellant presented to the State Supreme Court five propositions of law, the third of which dealing with the referendum we do not press upon this Court since it may be viewed as a State question. The first and second dealt with the validity of the zoning action and the fourth and fifth with the effect of the Act of Congress of August 8, 1894, and the invalidity of the oil and gas lease or contract in the light thereof. These four propositions are presented to this Court by the present assignment of errors though in more specific and detailed form than in the court below.

The State Supreme Court, after stating that appellant's first three propositions before it were expressly presented and decided adversely in three earlier cases in that court, declares:

> "We must take it as settled by our many former decisions that the State, by proper legislation, and by the legislation here attacked, may authorize and regulate the drilling for oil in the city limits."

Of the three cases cited by that court, one, *Beveridge* v. *Harper & Turner Oil Trust*, 168 Okla. 609, was a case which sought to obtain the right to drill for oil and gas in a prohibited area, and denying the application that court cited many of the evils arising from oil drilling, declaring that one of them was the presence of "oil well appliances and machinery as competitors of the playground apparatus usually provided for the neighborhood children." In the other two cases, *Keaton* v. *Brown*, 171 Okla. 38, and *Hubbard* v. *Oklahoma City*, 177 Okla. 263, the effort was the reverse of that in the *Beverage* case, injunctions being sought in each against drilling operations, and in both cases the court refused to pass upon the questions raised, asserting that while at one time the property in controversy was in non-drilling territory yet its status had been changed, and it was included within territory where drilling might be had

subject to the various other restrictions of the ordinance but that "while the action of the City Council in passing said ordinance is positive in its nature, it is negative in its character and effect," and therefore the complaint was not one attacking the action of the Council but complaining of its failure to act. Nevertheless, that court assumed to apply these three decisions as authority for the statement in the present case that "the city, by proper legislation, and by the legislation here attacked, may authorize and regulate the drilling for oil in the city limits."

The State Supreme Court also cited another of its earlier decisions, *Oklahoma City* v. *Keaton,* 178 Okla. 294, saying with respect thereto:

> "The plaintiff sought in a former action to prevent the execution of the oil lease and the granting of the permit to drill, but such effort did not succeed."

The natural implication of this language is that the decision in that case was against this appellant. The fact, however, was that after a decision against him in the trial court he moved for a new trial, the same was granted, the defendants appealed and pending the appeal the contract was actually executed and the drilling operations began. For this reason, the Oklahoma Supreme Court held the question to be moot and made no other ruling.

Furthermore, there is a broad distinction between property owned by the municipality as such and that dedicated to the use, service and benefit of its inhabitants. The latter cannot be so conveyed or used as to divert the same to other uses. It equally follows that the municipality when acting as a zoning body is subject to the same limitations. It cannot change zoning so as to divert the trust upon which the property is held, especially where the only purpose of the change is to reap financial benefit from oil royalties (post, pp. 19, 21-2).

In the light of authorities reviewed (post, p. 25), it is certainly evident to anyone that, in this respect at least, the ground of the action of the State Supreme Court is unsubstantial and untenable if not a direct attempt to avoid the possibility of a review by this Court.

With respect to the fourth and fifth propositions presented by the appellant to the State Supreme Court, it did not, as the appellees contend, decide the same "upon the general law of said State without any reference to or discussion of a Federal question" but it did pass upon the Federal questions raised before it by appellant, stating that in his fourth proposition he contended that the appellee Oklahoma City never acquired title in fee simple to any portion of the land included within the boundaries of Riverside Park and hence had no legal authority to alienate same, but that even were it conceded that the City acquired such title it had no legal authority to divert the use of any part thereof from park purposes to that of mining for the production of crude petroleum, and that appellant's fifth proposition was that he had a valuable vested property right in said Riverside Park in the nature of an easement, of which right and interest he had been deprived by the alleged wrongful acts of the appellees.

In disposing of appellant's fourth and fifth propositions, the State Supreme Court dealt with the matter as if Riverside Park had been created either by an ordinary conveyance to the City or by a dedication by the City or by individual property owners, but the conveyance involved in this case was one made by an Act of Congress approved August 8, 1894 (28 Stats. L. 264), and which reads as follows:

> "An Act granting a certain Military Reservation to Oklahoma City, Oklahoma Territory, to aid the public free schools thereof, and for other purposes.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled.

"That the abandoned Military Reservation of Oklahoma Territory, comprising the Southwest Quarter of Section Thirty-four, Township Twelve, North of Range Three West, is hereby granted to said Oklahoma City in trust for the use and benefit of all children of said City of Scholastic age, without distinction of race, except such portions of said reservation as are reserved for the purposes and uses hereinafter described.

"Sec. 2. That no less than ten acres of said reservation shall be set apart and used by said City for the location of public buildings and for a public park. That within ninety days after the passage of this Act the Southern Kansas Railway Company shall have the right to purchase from said City, adjoining said Company's present right of way, for Depot Grounds and other Railroad purposes, not to exceed six acres of said reservation, the value thereof and the price to be paid therefor, to be fixed by the appraisers to be appointed by the Secretary of the Interior within said ninety days. That the permits heretofore granted to the Choctaw, Coal and Railroad Company, by the Secretary of War for the lands across and upon said reservation, shall remain in force until such time as the land so granted shall cease to be used for Railroad purposes, when the same shall pass to said City.

"Sec. 3. That said City shall cause the remainder of said reservation hereby granted to be divided into Lots and Blocks, corresponding as near as practicable with the plat of said City. All streets, alleys and avenues to be laid out on the reservation, are hereby dedicated to and shall be held for the use of the public, and the Lots and Blocks shall be sold for the use of the Public free schools of said City. When sales are made and the purchase money all paid, said City shall execute proper deeds to the purchasers."

As stated in Section 1 of the Act, said addition "is hereby granted to said Oklahoma City *in trust* for the use and benefit of all children of said City of scholastic age, without dis-

tinction of race, *except such portions of said reservation as are reserved for the purposes and uses hereinafter described.*" (Italics ours.) The first reservation is stated in Section 2, as follows:

> "That no less than 10 acres of said Reservation shall be set apart and used by said City for the location of public buildings, *and for a public park.*" (Italics ours.)

It is elementary, that there is a vital distinction between conveyances, grants and dedications by private parties on the one hand and those by Governmental authority on the other.

Public grants are to be construed strictly in favor of the public. Ambiguities are to be resolved against the grantee.

Russell v. *Sebastian*, 233 U. S. 195, 205;

Cleveland Electric R. Co. v. *Cleveland*, 204 U. S. 116, 129-30;

Blair v. *Chicago*, 201 U. S. 399, 471 *et seq.*

Acts of Congress granting lands are laws as well as grants and must be given the exactness of laws. "Relief could have been applied for, and it might be, have been secured, through an appeal to Congress. Certainly evasion of the laws or the defiance of them should not have been resorted to." *Oregon etc. Co.* v. *U. S.*, 238 U. S. 393, 422, 427, 435.

The Act of Congress of August 8, 1894, was a law as well as a grant. Resort should not have been had to evasion or to defiance of its requirement "that no less than ten acres of said reservation shall be set apart and used by said City for the location of public buildings and for a public park." Instead, application should have been made to Congress where, of course, relief would not have been granted because of the intervening vested rights which had been acquired by this appellant and others in like situation.

In the *City of Cincinnati* v. *The Lessee of White*, 6 Pet. 431, this court held, even in the case of a private party dedi-

cating streets and a public common through a tract of land, in accordance with which dedication he sold lots, that:

> "All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged use of the land in order to carry into effect the purposes intended than may be necessary in an appropriation for a highway in the country. But the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground in both cases; and applies equally to the dedication of the common as to the streets. This was for the public use, and the convenience and accommodation of the inhabitants of Cincinnati; and doubtless greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public ground.
>
> "And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. *It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted.*" (Italics ours.)

See also, *Morgan* v. *Chicago, Etc., Co.*, 96 U. S. 716, 723.

With how much greater effect does this principal apply to the present case where the City of Oklahoma laid out the streets and the park through land acquired by it by way of a grant from the Congress of the United States upon the express condition that no less than ten acres "should be set apart and used by said City for the location of public buildings, and for a public park."?

This court has held, in the case of Congressional grants for school purposes, that every purchaser of such lands from the Congressional grantee acquires an interest in the

reservation for school purposes, pointing out that the donation of the land is from the United States and not by the State or as here by the city, saying:

> "The donation in no sense proceeded from the State. It was made by the Federal Government and is no more subject to State power than if it had been given by an individual for the same purpose."
>
> *Vincennes' University* v. *Indiana*, 14 How. 269, 276-7.

The cases cited by the Oklahoma Supreme Court in its opinion, when examined, do not conflict with these views, are no authority for the propositions to which they are cited, and the language of the court in that regard can only be regarded as an untenable and unsubstantial effort to evade the obligations of the Federal Constitution.

These cases are four in number, *Phillips Gas & Oil Co.* v. *Lingenfelter*, 262 Pa. 500, 5 A. L. R. 1495; *Priddy* v. *School District No. 78*, 92 Okla. 254; *Reichelderfer* v. *Quinn*, 287 U. S. 315; and *East Chicago Co.* v. *City of East Chicago*, 171 Ind. 654.

In the *Phillips* case, one Smith, owning a tract of 176 acres, sold and conveyed one-half acre to the school directors and their successors in office "for school purposes only". Following his death, his successors in title executed an oil and gas lease of the whole tract including the one-half acre. Subsequently, the school district in turn executed an oil and gas lease to another party who began drilling thereunder, and the lessee under the Smith title brought suit against the school district's lessee for an injunction and an accounting on the theory that the gas and oil under the half acre tract had not been conveyed by Smith to the school district but remained in him and passed to the complainant as a lessee of the oil and gas under the entire 176 acre tract. The case was decided entirely upon a Pennsylvania statute, the court saying:

> "The right expressly given by the statute to the school district was not only to purchase the lot, but to sell the whole, or any part of it, and reinvest the proceeds for school purposes. The words upon which the appellant relies as debasing the fee are merely superfluous, and not expressive of any intention of the parties to the conveyance as to the effect to be given to it. The directors of the school district could not have purchased the lot for any other purposes than that named in the deed, and their acceptance of it with the insertion in it of the words "for school purposes only", was a needless admission by them that they were acting within the powers conferred upon them by the act of the Assembly. It was simply that, and nothing more, and the deed, in all other respects admittedly conveying an absolute estate, is not affected by them."

In the *Priddy* case, one acre of land "now occupied as a school house site" was sold and conveyed to a school district, the *habendum* clause containing the following language: "As long as used for a school house site. If it is ever abandoned as a school house site said land shall revert to Frank B. Eddy." The school district granted an oil and gas mining lease to a development company which brought in a producing well on the site. During the entire time the school district continued to conduct the school. The property was never abandoned as a school house site, and the decision of the Oklahoma Supreme Court can be summed up in one sentence from its opinion:

> "The deed provides for forfeiture if the property should be abandoned as a school site, but does not provide for a forfeiture by the additional use of the property."

These cases are a far cry from the situation which we have here of a Congressional grant upon the terms contained in the statute making the grant.

Even so, the two cases cited on this proposition by the Oklahoma Supreme Court seem to be the exception rather than the rule. To the contrary, see:

City of Leadville v. *Bohn Mining Co., et al.*, 37 Colo. 248;
Sowadski v. *Salt Lake County*, 36 Utah 127;
Wayne v. *Miller*, 31 Mich. 447;
Neil v. *Independent Realty Co.*, 317 Mo. 1235;
School District v. *Barnes*, 110 Kans. 25;
Bumpus v. *Gas Co.*, 86 W. Va. 227.

Of the two other cases cited by the Oklahoma Supreme Court, from *Reichelderfer* v. *Quinn*, 287 U. S. 315, it quotes the excerpt: "Landowners derived no rights against government merely from dedication of nearby land as park; such dedication being declaration of public policy, which same or succeeding Congress might change by devoting land to other uses," and from the *East Chicago Co.* v. *City of Chicago*, 171 Ind. 654, is quoted the following excerpt:

> "Owners of private property in the vicinity of a public square, whose means of ingress and egress would not be destroyed or affected by a discontinuance of its use for public purposes, have no vested rights in its continued use as a public square, their losses being merely consequential and not direct, and its discontinuance would not be a taking of private property without compensation."

Both of these cases are clearly distinguishable from the present one.

With respect to the *Reichelderfer* case, it is to be noted that, by an Act of Congress, Rock Creek Park was condemned under the power of eminent domain and neighboring lands were assessed with benefit assessments. Subsequently, by further Act of Congress the Commissioners of the District of Columbia were directed to build a fire

engine house at a designated location within the park. It was claimed that the neighboring property owners had vested rights in the continuance of the park as a park in its entirety without the establishment of a fire engine house within its limits and that, because the erection of the fire engine house at a designated point constituted a violation of the zoning regulations of the District of Columbia, it would be an unlawful structure. The United States having paid in full in cash for the land dedicated by it as a park, this Court held that it had the right, *through Congress,* to change the use by establishing a fire engine house within its limits, and also held that Congress was within its rights in ignoring the zoning regulations as they "may be modified by Congress," and the effect of the act providing for the fire engine house was a modification of the zoning regulations.

Vital distinctions between the *Reichelderfer* case and the one now before the Court may be readily pointed out, but for present purposes the following are sufficient: (a) The United States acquired the fee simple title to the park lands for a full, valuable consideration; (b) The United States did not lay out the streets surrounding the park land and sell lots fronting upon the same and no one of the complaining parties had purchased any lot from the United States nor had anyone else done so; (c) The act providing for the fire engine house did not attempt to authorize the United States to sell or lease any portion of the park to private parties for private or any other uses, but the Government retained full control and supervision thereof; (d) The structure sought to be enjoined was a fire engine house to be erected for the protection of the various buildings, cages and animals constituting the Zoological Garden which is part of Rock Creek Park, and which was deemed a necessary public improvement for the protection of this most important feature of the park itself, and (e)

The proposition decided relates to the power of the United States Government itself to change or modify its previously expressed policy with reference to a portion of a park purchased by the United States and dedicated by it to the use of the people of the entire nation—not a change by a donee from Congress of lands conveyed to it upon terms and conditions which are violated by the proposed change.

This last distinction is pointed out specifically and with exactness in Note numbered 4 constituting part of the opinion of this Court in the *Reichelderfer* case, and reading as follows:

> " 'A different question is presented in the cases relied on by the court below which indicate *that a dedication of land to the public, by an individual, or a conveyance to a municipality, to be used as a park, is subject to a condition or imposes a trust that the use be continued, breach of which may be restrained.* (Citations.) There, rights in the land or against the municipality were said to have been *reserved in the grantor or created in the owners of neighboring land by the terms of the grant.*' (italics ours.)
>
> " 'Equally distinguishable are the decisions which likewise deal with the authority of a municipality, not the power of the legislature, to divert park lands from park uses, but in which the lands were acquired by unrestricted purchase or by eminent domain'."

Citing 3 Dillon Municipal Corporations (5th Ed.), Secs. 991 et seq. Said section (991) reads as follows:

> " 'Municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute; they cannot, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons. The distinction is between property which a corporation

may own the same as a natural person and that which it holds in general or special trust.' "

The distinction pointed out by Dillon is recognized in the *East Chicago* case, the last of those cited by the Oklahoma Supreme Court, where, however, the Indiana Court declined to apply the rule because of an express statute of that State upon which the decision of the case was rested.

It is well settled that a serious and permanent injury to private property caused by a statute or ordinance enacted under the supposed authority of the police power but in excess of such power, falls within the inhibition of the Fourteenth Amendment.

Washington, ex rel. Oregon R. & N. Co. v. *Fairchild*, 224 U. S. 510, 56 L. Ed. 863;

U. S. v. *Northern Pacific R. Co*, 256 U. S. 51, 65 L. Ed. 825.

Before leaving this branch of the case, and turning to our final consideration, the law as to what constitutes the raising of a Federal question, we respectfully invite the attention of the Court to Art. XI, Section 1, of the Oklahoma State Constitution, which reads as follows:

> "The State hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act, and any other Act of Congress, for the uses and purposes and upon the conditions, and under the limitations for which the same was granted or donated; and the faith of the State is hereby pledged to preserve such lands and moneys and all moneys derived from sale of any of said lands, as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated."

Comment upon this language would be superfluous.

The motion to dismiss rests upon three decisions of this Court, *Hiawassee River Power Co.* v. *Carolina-Tennessee*

Power Co., 252 U. S. 341; *Honeyman* v. *Hanan*, 300 U. S. 14; and *Lynch, et al.*, v. *People of New York*, 293 U. S. 52.

In the *Hiawassee* case, suit was based upon the alleged invalidity of a charter of a corporation consisting of a special act of the legislature. At the trial, objection was made to the offer in evidence of the said private Act "on the ground that the same was in terms and effect a monopoly and a void exercise of power by the state legislature which undertook to provide it, it being opposed and obnoxious to the bill of rights and the constitution, and in violation of the 14th Amendment," the admission of this evidence being among the errors assigned in this Court.

Brandeis, J., said:

> "The law, whether valid or invalid, was clearly admissible in evidence, as it was the foundation of the equity asserted in the bill. No right under the Federal Constitution was necessarily involved in that ruling • • •. In the Supreme Court of the state no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that Court."

Here, however, as we have seen, the Federal questions were passed upon by the Supreme Court of Oklahoma.

In the *Honeyman* case, Hughes, C. J. said: "The amended complaint and the motion to dismiss for the insufficiency of its allegations contained no mention of a Federal question," and as quoted in the instant motion to dismiss the Chief Justice also said:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause. Lynch *v.* New York, 293 U. S. 52, 54, 79 L. Ed.

> 191, 192, 55 S. Ct. 16, and cases there cited. Whether these requirements have been met is itself a Federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the Federal Question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. • • •
>
> "'We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that Court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. (Citations.)"

Here, it is evident "that the judgment as rendered could not have been given without deciding" the Federal questions involved.

Furthermore, in the *Honeyman* case, the Chief Justice also said:

> "And it has been in recognition of the established principle governing the exercise of our jurisdiction, and not as a departure from it, that we have said that opportunity might be afforded upon seasonable application to obtain a certificate from the state court where it appeared that an appropriate certificate might lead to a better understanding of the record. (Citations.)"

Accordingly, if this court should be in any doubt that the Federal questions now raised were presented to the State Supreme Court, we hereby make application for leave to obtain an appropriate certificate from that court.

In the *Lynch* case, similar language was used as in the *Honeyman* case, that if it appear "that the judgment as rendered could not have been given without deciding" the Federal questions, jurisdiction of this Court attaches.

The three cases thus cited by the appellees are sufficient in themselves to sustain the jurisdiction, and to call for a

denial of the motion. It may not be amiss, however, to summarize to some extent the prior decisions of this Court as to what constitutes the raising of a Federal question. They may be summed up in a few words, following which we shall review some of the decisions:

A State court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of this Court, in a case where as here a Federal question was so involved that its determination was necessary to a disposition of the case, especially where the Federal right claimed would, if recognized and enforced, require a different judgment from that actually rendered. This Court will review a Federal question, even though it was not put in issue by the pleadings or directly passed upon in the opinion, where it is apparent from both the pleadings and the record that the decision in the State court could not have been reached except by disposing of such question. In any event, where the State court does pass upon the question, as it did here, this Court will always review the decision of the lower court.

> "Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, Constitutional obligations cannot be thus avoided. (Citations.)"
>
> *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282;
> *Ward* v. *Love County*, 253 U. S. 17, 22-23;
> *Broadwell* v. *Carter County*, 253 U. S. 25;
> *Terra Haute etc. Co.* v. *Indiana*, 194 U. S. 579, 589;
> *Klinger* v. *Missouri*, 13 Wall. 257.

Where a determination of the Federal question in favor of the appellant would be controlling, the fact that the

decision of the State court is in terms based upon non-Federal grounds is unimportant.

State of California v. *Deseret Water etc. Co.*, 243 U. S. 415, 417;
Rogers v. *County of Hennepin*, 240 U. S. 184, 188;
Miller v. *New Orleans etc. Co.*, 211 U. S. 496, 503;
Toledo etc. Co. v. *Slavin*, 236 U. S. 454, 457.

"Where a state court holds that a Federal question is made before it, according to its practice, and proceeds to determine it, this Court will regard the question as duly made. (Citations.)"

Miedrich v. *Lauenstein*, 232 U. S. 236, 243;
North Carolina R. Co. v. *Zachary*, 232 U. S. 248, 257;
Mallinckrodt Chemical Works v. *Missouri*, 238 U. S. 41;
Chambers v. *B. & O. R. R. Co.*, 207 U. S. 142, 148.

That which is an essential although an unmentioned element of the decision of the State court, is a basis in the Federal question set up.

Carondelet Canal Nav. Co. v. *Louisiana*, 233 U. S. 362, 376;
Consolidated Coal Co. v. *Illinois*, 185 U. S. 203, 206;
Tilt v. *Kelsey*, 207 U. S. 43, 50.

"It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation,—although the opinion of the state court does not expressly refer to the Constitution of the United states,—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or gen-

eral law would be error; for the federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this Court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in Chicago B. & Q. R. Co. *v.* People (recently decided), 200 U. S. 561."

West Chicago R. Co. v. *Illinois*, 201 U. S. 506, 519-20.

Certainly, here, "the federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them."

"The court could not have decided as it did without overruling that claim, so that the jurisdiction of this Court is clear, although it is denied."

Otis Co. v. *Ludlow Mfg. Co.*, 201 U. S. 140, 150-1.

"Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, howeve. the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law."

Chicago, B. & Q. R. Co. v. *Illinois*, 200 U. S. 561, 580.

Where a special benefit assessment was imposed upon real estate and a personal judgment entered against the owner for the amount of the assessment, a non-resident property owner contested the validity of the judgment in the State court and sought unsuccessfully to attack the assessment itself in this Court, where it was said:

> "If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued."
>
> *Dewey* v. *Des Moines,* 173 U. S. 193, 197.

Where the record shows by clear and necessary intendment that the Federal question must have been directly involved so that the State court could not have given judgment without deciding it, the Federal question sufficiently appears.

Dewey v. *Des Moines,* 173 U. S. 193, 199;
Houston etc. Co. v. *Texas,* 177 U. S. 66, 74;
Mobile & Ohio R. Co. v. *Tennessee,* 153 U. S. 486, 495;
Terra Haute etc. Co. v. *Indiana,* 194 U. S. 579, 587, 589.

> "It has never been held that the record of the proceedings of the highest court must state in terms a misconstruction by that court of the Act of Congress. It is enough that it is an inference of law, from the inspection of the whole record, that the highest court did thus misconstrue an Act of Congress, and annul a right or title, otherwise valid, by reason of such misconstruction."
>
> *Neilson* v. *Lagow,* 12 How. 98, 109.

> "Certain it is that Federal questions are directly involved in the pleadings, and if it appears that none of the other defenses afford any legal answer to the

suit, the conclusion must be that the case is properly here, as this Court will not presume that the court below decided these issues erroneously in order to defeat their own jurisdiction. (Citations.)"

Magwire v. *Tyler*, 8 Wall. 650, 75 L. Ed. 320, 325.

A Federal question having been properly raised, this Court has jurisdiction and must examine the judgment so far as to enable it to decide whether the Federal question was correctly adjudicated by the State court, and, if not, this Court must further inquire whether there is any other matter or issue adjudged by the State court which is sufficiently broad to maintain its judgment notwithstanding the error in deciding the Federal question, yet if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, this Court will reverse the judgment of the State court and either render such judgment as the State court should have rendered or remand the case to that court, as the circumstances of the case may require.

Murdock v. *Memphis*, 20 Wall. 590, 87 L. Ed. 429, 444.

"Where the State Supreme Court said in terms 'whether the Act of Congress * * * has any applicability at all in actions for negligence in the courts of Pennsylvania is a question that does not arise in this case, and we therefore express no opinion upon it,' yet this Court taking jurisdiction said, 'if the question is duly raised and the judgment necessarily, or by what appears, in fact involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it.'"

Schlemmer v. *Buffalo etc. Co.*, 205 U. S. 1, 11.

It is, of course, optional with this Court, with respect to the pending motion to dismiss, (a) to act upon it now, (b) to pass it to the hearing on the merits, (c) to transfer to the

summary docket for hearing, (d) to hold it and allow the application hereinbefore contained (*supra*, p. 24) for leave to obtain a certificate from the State Supreme Court in the event this Court has any doubt as to the propriety of overruling the motion, or (e) under Section 237-c of the Judicial Code, to act upon it as a petition for certiorari, and in the latter event, the attention of the Court is invited to the fact that, treated as a petition for certiorari, it would no doubt be granted as so regarded it is identical with *Noble* v. *City of Oklahoma City*, 297 U. S. 481, where the petition for certiorari was granted.

It is respectfully submitted, however, that the motion to dismiss should be denied at this time.

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